03-9046 (6)

No. [redacted]

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

# PETITION FOR WRIT OF CERTIORARI


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(a) Questions Presented for Review

**CAPITAL CASE**

1. Can a federal court stay (rather than being compelled to dismiss) a §2254 habeas corpus petition which includes exhausted and unexhausted claims, when the stay is necessary to permit a petitioner to exhaust claims in state court without having the one year statute of limitations in the Antiterrorism and Effective Death Penalty Act (AEDPA) bar the right to a federal petition?

2. Is the Eighth Circuit correct that dismissal of a mixed §2254 petition is mandated by Rose v. Lundy, or are the courts of appeals for the first, second, sixth, seventh and ninth circuits correct in following the separate concurrences of Justice Souter and Justice Stevens in Duncan v. Walker that a stay of an otherwise timely filed federal petition is permissible in light of the AEDPA?

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(d) Citations to Opinions

The district court decision is unreported, but found at Tab 1 in the Appendix. This appeal is from the Eighth Circuit's reversal of the district court decision, which is Rhines v. Weber, 346 F.3d 799 (8th Cir. 2003), rehearing en banc denied, ____F.3d _____, No. 02-2990 (8th Cir. Nov. 24, 2003), Tab 2 in the Appendix. That decision incorporates the analysis and ruling in Akins v. Kinney, 341 F.3d 681 (8th Cir. 2003), Tab 3 in the Appendix.

The affirmance of the capital murder conviction of Mr. Rhines is State v. Rhines, 548 N.W.2d 415 (S.D. 1996) cert. denied 519 U.S. 1013 (1996), at Tab 4 in the Appendix. The denial of Mr. Rhines' first state habeas petition is reported at Rhines v. Weber, 608 N.W.2d 303 (S.D. 2000), which is Tab 5 in the Appendix.

(e) Basis of Jurisdiction

The Eighth Circuit issued its opinion on October 7, 2003, and denied the petition for rehearing en banc on November 24, 2003. Jurisdiction in this Court rests on 28 U.S.C. § 1254(1).



(f) Certain Provisions of Law

Article 1, Section 9 of the United States Constitution:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

28 U.S.C. § 2254(a)

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2244

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation until this subsection.

(g) Concise Statement of Case.

Petitioner Rhines was sentenced to death for a murder perpetrated during an after hours burglary of a doughnut shop in Rapid City, South Dakota. Rhines raised certain constitutional challenges to his conviction on direct appeal and through a state habeas corpus case. Although the South Dakota Supreme Court found a part of the South Dakota death penalty statute unconstitutional in its application to Rhines, his conviction and death sentence were affirmed.

On February 22, 2000, Rhines filed a pro se habeas petition under 28 U.S.C. § 2254. Rhines also filed pro se a "Motion to Toll Time" out of concern about the one year limitations period set by the Anti-terrorism and Effective Death Penalty Act (AEDPA). Respondent Warden Weber responded asking that the motion "be denied because it is unnecessary, only (8) or (14) days having run on the Section 2244 1-year statute of limitations." The federal district court agreed with Respondent Weber and denied the motion.

The district court on July 3, 2002, determined that Rhines had filed a mixed petition. By that point, Rhines' federal petition had been pending for nearly two and a half years. If Rhines' petition were to be dismissed at that point, the AEDPA would forever bar Rhines from refiling a §2254 petition. Rhines had moved for a stay of the federal habeas corpus proceeding to allow him to return to state court to seek to exhaust the claims, if the petition were found to be a mixed petition. The district court granted a stay, relying upon the concurrences of Justice Stevens and Justice Souter in Duncan v. Walker and other decisions from courts of appeals commending a stay "when the original habeas petition, though unexhausted, is timely filed, but there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely." See Appendix Tab 1 at p.9.



Respondent appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed the stay, relying upon its decision in Akins v. Kinney, which was issued while the Rhines case was before the Eighth Circuit. In the Akins case, the Eighth Circuit chose to follow pre-AEDPA and pre-Duncan authority in refusing to allow a district court to stay such a petition. The Eighth Circuit recognized that its ruling put the Eighth Circuit at odds with other circuits that have considered the issue. On November 24, 2003, the Eighth Circuit denied rehearing en banc on the issue presented here.

(h) Reasons the Writ Should Be Granted.

The decision of the United States Court of Appeals for the Eighth Circuit in this case conflicts with decisions from the United States Courts of Appeals for the First, Second, Sixth, Seventh, and Ninth Circuits on the same issue. The Courts of Appeals for the First, Second, Sixth, Seventh and Ninth Circuits follow the separate concurrences of Justice Souter and Justice Stevens in Duncan v. Walker, 533 U.S. 167 (2001), permitting a stay of the federal §2254 habeas petition, when it is a mixed petition and when dismissal of the petition will result in a bar under the one year limitation of the Antiterrorism and Effective Death Penalty Act (AEDPA). This petition presents a conflict between United States courts of appeals under Rule 10(a) of the Supreme Court Rules, and also presents an important question of federal law that has not been, but should be, settled by the United States Supreme Court under Rule 10(c) of the Supreme Court Rules.

In 1996, Congress passed the AEDPA, which, among other things, placed a one year limitations period on the time a person convicted in state court has to file a federal section 2254 habeas petition. 28 U.S.C. §2244(d)(1). In Duncan v. Walker, 533 U.S. at, 181-82, this Court determined that the filing of a federal habeas petition does not toll the statute of limitations in the AEDPA. The majority opinion in Duncan v. Walker did not reach the issue presented by this Petition for Writ of Certiorari. Id. at 181. Unlike Rhines in this case who filed his federal habeas petition when only 8 to 14 days, by respondent's own admission, had run on the one year limitation, the Petitioner in Duncan v. Walker had delayed more than nine months in filing a federal habeas petition after his first one was dismissed without prejudice. Id.

The two concurring opinions in Duncan, however, did address the issue presented by this petition. In this concurring opinion in Duncan, Justice Stevens wrote:



> First, although the Court's pre-AEDPA decision in Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1998, 71 L.Ed.2d 397 (1982), prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so, when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but nonmeritorious claims, see 28 U.S.C. § 2254 (b) (2) (1994 ed., Supp. V), and when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period.

Duncan, 533 U.S. at 182-83.

In his separate opinion, Justice Souter wrote:

> Although I join the Court's opinion in full, I have joined Justice Steven's separate opinion pointing out that nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies, and that a claim for equitable tolling could present a serious issue on facts different from those before us.

Id. at 182.

Since Duncan, the United States Courts of Appeals for the First, Second, Sixth, Seventh, and Ninth Circuits have permitted federal district courts to stay §2254 habeas petitions when a dismissal would jeopardize the Petitioner's ability to obtain federal review in light of AEDPA's one year statute of limitations. Nowaczyk v. Warden, New Hampshire State Prison, 299 F.3d 69, 79 (1st Cir. 2002); Zarvela v. Artuz, 254 F.3d 374, 380 (2d Cir. 2001), cert denied, 534 U.S. 1015 (2001); Palmer v. Carlton, 276 F.3d 777, 781 (6th Cir. 2002); Freeman v. Page, 208 F.3d 572, 577 (7th Cir. 2000), cert. denied, 531 U.S. 946 (2000); Brambles v. Duncan, 330 F.3d 1197, 1203 (9th Cir. 2003). As one Court of Appeals has described it, "there is a growing concensus that a stay is required when dismissal could jeopardize the Petitioner's ability to obtain federal review [under AEDPA's limitation.]" Nowaczyk, 29[illegible] F.3d at 79.

The United States Court of Appeals for the Eighth Circuit presently stands alone in determining that a district court lacks the ability to stay a federal habeas petition when the

AEDPA one year limitation has run during a time the federal petition was pending. Rhines v. Weber, 346 F.3d 799 (8th Cir. 2003), rehearing en banc denied, ___F.3d____, No. 02-2990 (8th Cir. Nov. 24, 2003); Akins v. Kinney, 341 F.3d 681, 685-87 (8th Cir. 2003). The Eighth Circuit based its decision on the pre-AEDPA case of Rose v. Lundy, 455 U.S. 509 (1982), in which this Court adopted the total exhaustion rule requiring district courts to dismiss habeas corpus petitions that are mixed. However, as the Eighth Circuit noted, when the Court decided Rose v. Lundy, there was no federal time limit on the Petitioner's ability to file a Section 2254 Petition, and thus there was no risk to the Petitioner from dismissing a petition without prejudice. Id.; Akins, 341 F.3d at 685.

The rationale for staying a federal habeas case in light of AEDPA notwithstanding Rose v. Lundy was explained by the United States Court of Appeals for the Second Circuit in Zarvela v. Artuz, 254 F.3d 374 (2nd Cir. 2001), as including the following:

> ". . . [T]he enactment of AEDPA has altered the context in which the choice of mechanics for handling mixed petitions is to be made. Before AEDPA, there was no statute of limitations. In that context, Justice O'Connor could write, "[O]ur interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." [Rose v. Lundy, 455 U.S.] at 520, 102 S.Ct. at 1198. With unlimited time, a prisoner could leisurely consider all possible federal claims and develop state court writs to exhaust them. After AEDPA, the prisoner has just one year. If he mistakenly comes to federal court too soon, i.e., with one or more unexhausted claims, and does so late in the allotted one year, a dismissal of his mixed petition risks the loss of all of his claims because the one year limitations period will likely expire during the time taken to initiate state court exhaustion and to return to federal court after exhaustion is completed.

Id. at 379.

The principles of Rose v. Lundy are served by a stay of a federal habeas corpus petition to allow an inmate to return to state court. In Rose v. Lundy, this Court based its decision on the fact that it "would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional



violation." Rose v. Lundy, 455 U.S. at 518. That is, federal courts apply the doctrine of comity, "which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Id. at 518 (quoting Darr v. Buford, 339 U.S. 200, 204 (1950)). Staying the exhausted claims would be a traditional way to "defer" to state court "until" that court has had an opportunity to exercise its jurisdiction over a habeas petitioner's unexhausted claims. Zarvela, 254 F.3d at 380.

The Zarvela court also addressed the concern that a petitioner could taken an undue amount of time to pursue state court remedies. In Zarvela, the court required that the petitioner exercise "reasonable diligence" in filing his state court claim. Id. at 381. In Rhines' case, the district court required reasonable diligence by allowing Rhines just sixty days to file the claim, and sixty days to return to the federal court after his claim was disposed of by the state court. See Appendix at Tab 1. As South Dakota law permits, Rhines filed a second state habeas petition within sixty days of the court's ruling notwithstanding this appeal. See Jackson v. Weber, 637 N.W.2d 19 (S.D. 2001).

This Court has not addressed the issue raised by this Petition, other than in the concurrences of Justice Souter and Justice Stevens. This Court recently granted a petition for writ of certiorari to the Ninth Circuit in Pliler v. Ford., 124 S.Ct. 981, 157 L.Ed. 2d 811, 72 U.S. L.W. 3446, sub. nom. Ford v. Hubbard, 330 F.3d 1086 (9th Cir. 2003) which appears to involve a related but different issue.

There now exists a split in authority among the circuits as to whether, as stated in Justice Steven's concurrence, a district court may "retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies" in the wake of the one

year AEDPA limitation. This is an important question not only to Rhines, but also to all habeas petitioners who file timely 2254 Petitions and wait out the remaining one year period for the district court to determine if complete exhaustion exists. The United States federal courts and federal petitioners deserve to know whether the law is as contained in the concurrences of Justice Stevens and Justice Souter and as five courts of appeal have held, or whether the law is, as the Eighth Circuit has held, unyielding dismissal of mixed petitions under Rose v. Lundy without leaving a district court discretion to stay a timely filed petition now time barred under the AEDPA.

Dated at Sioux Falls, South Dakota, this 19th day of February, 2004.


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**CERTIFICATE OF SERVICE**

The undersigned, one of the attorneys for Petitioner/Appellee, hereby certifies that two true and correct copies of the foregoing "Petition For Writ of Certiorari" were served upon:

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by First Class Mail on February 19, 2004.